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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11

12 PRINCESS SAMANTHA KENNEDY,
ADAM CLAYTON URICH,

13 Plaintiffs,

14 v.

15 PARAMOUNT PICTURES
16 CORPORATION,

17 Defendant.
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Case No. 12-CV-0372-WQH WMc

Honorable William Q. Hayes

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PARAMOUNT PICTURES
CORPORATION'S MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

[Fed R. Civ. P. 12(b)(6)]

**[Notice of Motion and Request for
Judicial Notice filed concurrently
herewith]**

Date: December 17, 2012

Time: 11:00 a.m.

Place: Courtroom 4

**[NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT]**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises from the fanciful claim that the motion picture *Titanic* was copied from the unpublished biographical works of Plaintiff Princess Samantha Kennedy (“Princess Kennedy”). Fifteen years after *Titanic* was released, Princess Kennedy and her son Adam Clayton Urich (collectively “Plaintiffs”) commenced this action, filing a single cause of action for copyright infringement against Defendant Paramount Pictures Corporation (“Paramount”).

In their First Amended Complaint, Plaintiffs allege that in creating *Titanic*, Paramount exploited and infringed three unpublished scripts that Princess Kennedy registered with the U.S. Copyright Office in 1991 and 1993 (“Plaintiff’s Biographies”). Plaintiff’s Biographies all relate essentially the same story—that of Princess Kennedy’s father, a former U.S. Air Force officer who was discharged from the Air Force in the 1950s after he became a whistleblower. Unable to find work after his discharge, Princess Kennedy’s father moved his family from state to state and eventually lost custody of his five children due to allegations of neglect.

Notably, this is not the first lawsuit in which Princess Kennedy claims that her Biographies have been infringed. In 1995, two years before *Titanic* was released, Princess Kennedy brought suit against Paramount alleging that the motion picture *Forrest Gump* infringed the very same copyrighted works she contends are infringed in this action. In the *Forrest Gump* action, this Court granted summary judgment for the defendants, which was affirmed by the U.S. Court of Appeals for the Ninth Circuit. The Court also warned Princess Kennedy that generic ideas, plots, or scenes cannot give rise to a copyright infringement and that further unsuccessful claims could expose her to liability for attorneys fees.

Despite the Court’s admonition in the *Forrest Gump* action, Princess Kennedy has now sued Paramount again on the same legally deficient theories. And

1 like her claims in the *Forrest Gump* action, Princess Kennedy’s First Amended
 2 Complaint in this case fails to state a claim for copyright infringement.

3 The most fundamental flaw in Plaintiffs’ claim is that *Titanic* is not
 4 “substantially similar,” as a matter of law, to Plaintiff’s Biographies. Paramount
 5 requests that the Court take judicial notice of Plaintiff’s Biographies and a copy of
 6 *Titanic*, both of which are referred to in the First Amended Complaint and therefore
 7 may be considered in connection with this Motion. It is well-settled that in
 8 connection with a motion to dismiss, this Court may analyze works to make the
 9 determination as to whether they are “substantially similar.” A comparison of the
 10 plot, themes, dialogue, mood, setting, pace, characters, and sequence of events
 11 demonstrates that *Titanic* is different in every respect from Plaintiff’s Biographies.
 12 Accordingly, Plaintiffs cannot state a claim for copyright infringement.

13 In addition, the First Amended Complaint includes, at best, allegations of
 14 infringement of generic *scènes à faire*, which copyright law does not protect.
 15 Further, Plaintiffs fail to properly allege that the writer of *Titanic* had access to the
 16 copyrighted works at issue.

17 The First Amended Complaint also admits that one of the Plaintiffs—Adam
 18 Urich—does not own the copyrights at issue or any of the exclusive rights thereto.
 19 Accordingly, Plaintiff Urich is not entitled to seek relief under the copyright laws
 20 and his claims should be dismissed.

21 Finally, these defects cannot be cured by further amendment. There is
 22 nothing that Plaintiffs can allege that will change the fact that Plaintiff’s Biographies
 23 and *Titanic* are not substantially similar in any way. Accordingly, dismissal is
 24 appropriate without leave to amend.

25 **II. FACTUAL AND PROCEDURAL BACKGROUND**

26 **A. Princess Kennedy’s Copyrights**

27 Plaintiffs allege that Defendant Paramount has infringed three copyrights
 28 belonging to Plaintiff Kennedy in connection with the film *Titanic*: (1) Copyright

1 Registration No. TXu000464805, entitled “My Daddy was a Whistleblower” with a
 2 registration date of April 5, 1991; (2) Copyright Registration No. PAu00548413,
 3 entitled “Missing Pieces” with a registration date of September 6, 1991; and (3)
 4 Copyright Registration No. TXu000583376, entitled “My Daddy was a
 5 Whistleblower” with a registration date of May 10, 1993 (collectively, “Plaintiff’s
 6 Biographies”). (First Amended Complaint (“FAC”), ¶ 6 & Exh. A.) Princess
 7 Kennedy alleges in the First Amended Complaint that Plaintiff’s Biographies are her
 8 “biographies” and based on her life. (FAC, ¶ 11.)

9 ***B. Princess Kennedy Previously Sued Paramount for Infringing Her***
 10 ***Copyrights In Connection With Forrest Gump***

11 On September 12, 1995, Princess Kennedy filed suit against Paramount in
 12 *Samantha Kennedy v. Paramount Pictures Corporation, et al.*, United States District
 13 Court for the Southern District of California, Case No. 3:95-cv-01954-K, alleging
 14 that Defendants Paramount, Viacom Inc., and Blockbuster Videos, Inc.
 15 (“Blockbuster”) were liable for infringing her rights in Plaintiff’s Biographies in
 16 connection with the motion picture *Forrest Gump* (the “*Forrest Gump* Action”).
 17 (RJN, Exhs. 1 (docket of the *Forrest Gump* Action) & 2 at ¶ 6 (Amended Complaint
 18 in *Forrest Gump* Action).) Princess Kennedy filed her Amended Complaint in that
 19 action on November 17, 1995. (*Id.*)

20 The crux of Princess Kennedy’s claims against Defendants Paramount,
 21 Viacom, and Blockbuster was that they had infringed her copyrights by using
 22 Plaintiff’s Biographies to make the movie *Forrest Gump* and unlawfully distributing
 23 that picture. (RJN, Exh. 2 (Amended Complaint in *Forrest Gump* Action).)
 24 Princess Kennedy also contended that *Forrest Gump* was substantially similar to
 25 Plaintiff’s Biographies because, for example, both sets of works referred to public
 26 figures and had characters who sat next to each other, who had “sweet voices,” or
 27 who were “isolated.” (RJN, Exh. 3 (Motion for Summary Judgment) at 17-20.)

28

1 The defendants in the *Forrest Gump* Action moved for summary judgment on
 2 the grounds that Princess Kennedy could not establish that Paramount had access to
 3 Plaintiff's Biographies and that there was no substantial similarity as a matter of law
 4 between Plaintiff's Biographies and *Forrest Gump*. (*Id.*) Defendants prevailed and
 5 obtained summary judgment against Princess Kennedy on February 14, 1997. (RJN,
 6 Exh. 1.)

7 After obtaining summary judgment, defendants also moved for an award of
 8 attorneys' fees and costs. (*Id.*) The Court found that Princess Kennedy's claims in
 9 connection with *Forrest Gump* were not frivolous or brought in bad faith, because
 10 "possibly Plaintiff did not understand copyright law." (RJN, Exh. 7 (Order Denying
 11 Defendants' Motion for Attorneys Fees and Costs).) However, the Court reminded
 12 Plaintiff that common words, phrases, and ideas are unprotectable *scènes à faire*.
 13 The Court further concluded:

14 Should Plaintiff choose to pursue any copyright claims
 15 against these or other Defendants in the future, and if
 16 Plaintiff does not prevail on such claims, **PLAINTIFF**
 17 **BEARS THE RISK OF HAVING TO PAY COSTS**
 18 **AND ATTORNEYS' FEES TO THE OPPOSING**
 19 **PARTY.** . . . Plaintiff has (1) had the law of copyright
 20 explained to her, (2) been advised of the doctrine of scenes
 21 a faire and (3) been warned that good faith, standing alone,
 22 is not enough to sustain a copyright infringement claim.

23 (*Id.* (emphases in original).)

24 Princess Kennedy unsuccessfully appealed the order granting summary
 25 judgment to the U.S. Court of Appeals for the Ninth Circuit. (*See* RJN, Exh. 1.)
 26 The U.S. Supreme Court denied her petition for writ of *certiorari*. (*See* RJN, Exh.
 27 1.)

28 **C. Princess Kennedy Now Sues Paramount for Infringing the Very
 Same Copyrights In Connection With Titanic**

Ten years after she exhausted her appeals in the *Forrest Gump* Action,
 Princess Kennedy sued Paramount again. Without claiming *which* copyright was at
 issue in this case, or *how* Paramount had access to their copyrighted works,

1 Plaintiffs filed their original Complaint in this action alleging that Princess Kennedy
2 “own[s] all the rights to this motion picture [*Titanic*].” (Doc. 1, at 11.)

3 Paramount moved to dismiss the Complaint on July 12, 2012, on the grounds
4 that the Complaint did not sufficiently allege a claim for copyright infringement
5 because it failed to allege infringement of protectable elements or even identify the
6 copyright registrations at issue. (Doc. 14.) Two weeks later, Plaintiffs requested
7 leave to file a First Amended Complaint. Plaintiffs’ request was granted thereby
8 rendering Paramount’s Motion to Dismiss moot. (Doc. 22.) Plaintiffs filed their
9 First Amended Complaint on October 26, 2012. (Doc. 24.)

10 In the First Amended Complaint, Plaintiffs admit that the copyrights at issue
11 are Plaintiff’s Biographies—*the same copyrights* Princess Kennedy contended were
12 infringed by Paramount in creating *Forrest Gump*. (*Compare* FAC, ¶ 6 (copyrights
13 allegedly infringed in this action *with* RJN, Exh. 2 at ¶ 6 (copyrights allegedly
14 infringed in the *Forrest Gump* Action).) Plaintiffs further allege that Princess
15 Kennedy is the sole owner of the copyrights for Plaintiff’s Biographies, and that
16 Paramount acquired copies of her copyrighted work during discovery in the *Forrest*
17 *Gump* Action. (FAC, ¶ 13.) Plaintiffs allege that Paramount “copied” Plaintiff’s
18 Biographies to create *Titanic*. (*Id.*) Plaintiffs also allege that Paramount is liable for
19 up to \$3 billion in damages, impoundment and destruction of all infringing works,
20 and punitive damages. (FAC, ¶¶ 11, 15 & Prayer, ¶¶ 4, 10, 11.)

21 ***D. Synopsis of Plaintiff’s Biographies***

22 The following is a summary of Plaintiff’s Biographies, copies of which are
23 submitted as Exhibits 4, 5, and 6 to Paramount’s Request for Judicial Notice. Each
24 of Plaintiff’s Biographies relates essentially the same story—the family history of
25 Teresa Urich aka Teresa Kennedy and Princess Samantha Kennedy. (*See* FAC,
26 Exh. B.)

27 The main characters in Plaintiff’s Biographies are her parents Gilbert Glenn
28 (“Gilbert”) and Lorine Kennedy (“Lorine”). Gilbert, an intelligent and

1 accomplished officer in the United States Air Force, meets and falls in love with
 2 Lorine in the beginning of the story. Over Lorine's mother's objection, the two get
 3 married in June 1952 and later move to Wyoming, where Gilbert continues his
 4 military training and distinguishes himself as an exemplary officer.

5 After Gilbert completes his advanced training, he is stationed at an airbase in
 6 Newfoundland as a records specialist. During this tour of duty, Gilbert discovers
 7 that his superiors—General Pepperlilly and Colonel Rose—are committing various
 8 acts of misconduct, including misappropriating military property, storing illegal
 9 toxic wastes, and organizing parties rampant with prostitution. Gilbert subsequently
 10 reports this misconduct (thus becoming the “whistleblower”) to Senator Estes
 11 Kefauver,¹ who promises to investigate the complaints.

12 U.S. Air Force officials learn of Gilbert's reports and conspire to force Gilbert
 13 out of the service, despite his exemplary record. A base commander arranges for a
 14 military doctor to intentionally administer drugs to Gilbert in order to trigger a
 15 protracted series of illnesses and symptoms that allowed the U.S. Air Force to
 16 discharge Gilbert under the pretense that he is “unsuitable” for service.

17 After his discharge, Gilbert moves his family, then consisting of his wife
 18 Lorine and their firstborn child (a “retarded son” named Damon) to Tennessee.
 19 While living in Tennessee, the Glenn's had three more children. Because of the
 20 “unsuitable” denotation on his discharge papers and other “secret codes” signifying
 21 that Gilbert is a traitor to the United States, Gilbert has significant difficulty finding
 22 gainful employment. Gilbert also becomes the subject of a McCarthy era
 23 investigation led by the Federal Bureau of Investigation for possible communist
 24 activity.

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 26
 27 ¹ Estes Kefauver was the United States Senator for Tennessee from 1949 to 1963.
 28 Biographical Directory of the United States Congress,
<http://bioguide.congress.gov/scripts/biodisplay.pl?index=K000044>.

1 Gilbert and Lorine relocate to Ohio in hopes of finding a better life. During
 2 their time in Ohio, Lorine gives birth to their fifth child, Therese. Gilbert continues
 3 to experience difficulties in finding meaningful employment, and in 1959, the
 4 family returns to Tennessee. After the move, Gilbert is accused of neglecting and
 5 abusing his children by Lorine's mother, Ethel—who had disapproved of the
 6 marriage from the start. After a cursory investigation of the complaints, the children
 7 are taken from Gilbert and Lorine and sent to foster homes.

8 Eventually, Gilbert and Lorine are exonerated of the charges of neglect and
 9 abuse, but are not reunited with their children. Throughout the 1960s and 1970s,
 10 Gilbert dedicates his life to finding all of his children—even while suffering from an
 11 illness that caused paralysis of his legs. Gilbert is able to locate his three middle
 12 children, and continues to call on numerous public officials, such as congressmen,
 13 senators, and even officials working with President Nixon for help in finding the
 14 other two. Eventually, Gilbert finds Therese who is a struggling singer that has
 15 recovered from a near fatal brain disease. Gilbert is overwhelmed with joy that he
 16 has found Therese and tells her his life story including how the government was
 17 responsible for all of the family's troubles. Gilbert dies, however, before finding his
 18 eldest son, Damon.

19 ***E. Synopsis of Titanic***

20 Following is a summary of the motion picture *Titanic*, a copy of which is
 21 lodged with the Court as Exhibit 8 to Paramount's Request for Judicial Notice.
 22 Released in 1997, *Titanic* has been described as *Romeo and Juliet* aboard the
 23 *Titanic*, a British passenger liner that sank in the Atlantic Ocean on April 15, 1912
 24 after colliding with an iceberg.

25 *Titanic* begins in modern day, with treasure hunter Brock Lovett exploring the
 26 remains of the *Titanic*, still at the bottom of the ocean. Lovett is looking for the
 27 "Heart of the Ocean" necklace—a 56-carat blue diamond reportedly once owned by
 28 King Louis XVI of France. Lovett's exploration is not entirely unsuccessful—he

1 and his team uncover a locker that gives them one clue: there is a drawing of a nude
2 woman wearing the necklace.

3 A passenger who was believed to have died when the Titanic sank, sees
4 Lovett's discovery on television, and contacts the explorers to inform them that she
5 is the one depicted in the drawing. Rose flies out to meet with the explorers and
6 tells them the story of her days aboard the Titanic.

7 *Titanic* then shifts to its central story which takes place aboard the Titanic in
8 1912. The story centers on two individuals: Jack Dawson ("Jack"), a young artist
9 and drifter who wins a third-class ticket for voyage on the ship in a poker game; and
10 Rose DeWitt Bukater ("Rose"), a first-class passenger traveling with her wealthy
11 fiancé, Caledon Hockley ("Cal") and her mother, Ruth DeWitt Bukater. Rose's
12 engagement to Cal has been forced upon her by her mother in an effort to preserve
13 their social status and wealth.

14 Distraught by her forced engagement, Rose attempts to commit suicide by
15 jumping over the ship's railing. Rose is saved by Jack, who finds her at the railing
16 and convinces her not to jump. Rose's fiancé, Cal, comes upon the two and Rose
17 tells him that Jack saved her from falling off the ship whilst she was looking over
18 the ship's edge. As a gesture of gratitude, Cal invites Jack to join them for dinner in
19 the first-class dining room. Dinner highlights the extreme differences in social
20 status between Jack and Rose. Later that night, Rose joins Jack at a party in the
21 third-class part of the ship, which she thoroughly enjoys. The two develop a
22 friendship, and a romance blossoms. The forbidden romance culminates in Rose
23 asking Jack to sketch her nude wearing the "Heart of the Ocean," and a night of
24 passion in a car that is in the ship's cargo.

25 That same night, the Titanic collides with an iceberg and a frenzy ensues.
26 Preparing to evacuate, Cal discovers the nude drawing of Rose and learns about the
27 romance between his fiancée and Jack. Cal has his bodyguard slip the Heart of the
28 Ocean into Jack's coat pocket to frame Jack for stealing. Jack is subsequently

1 arrested and handcuffed to a pole, and Cal retrieves the necklace. Rose learns of
2 Jack's arrest, finds an axe, and frees Jack.

3 Meanwhile, passengers are beginning to evacuate the ship. Cal and Jack
4 convince Rose to leave on a lifeboat and assure her that they will follow. Rose
5 cannot bear to leave Jack, however, and she jumps back on board the Titanic from
6 her lifeboat to join him. Cal chases the couple with a pistol, shooting at them in an
7 effort to break them up. After exhausting his ammunition and realizing that his
8 efforts are futile, Cal jumps ship, remembering after the fact that he had given his
9 coat—which held the “Heart of the Ocean” necklace—to Rose as she was boarding
10 the lifeboat.

11 Jack and Rose are on the deck of the Titanic when the ship breaks in half and
12 proceeds to sink. Rose and Jack end up in the water with one piece of debris on
13 which Rose floats. Ultimately, they are discovered by a lifeboat that is searching for
14 survivors; but Jack, who has been in the water, has died of hypothermia. When
15 Rose boards the survivor ship, she provides the name of “Rose Dawson” in an
16 attempt to escape detection by Cal or her mother.

17 The story of *Titanic* then returns to the present day, with Rose at the stern of
18 Lovett's ship, having just virtually re-lived the experience of being aboard the
19 Titanic. Rose takes out the “Heart of the Ocean” necklace—which she had with her
20 all along—and drops it into the ocean. The story concludes with Rose dreaming
21 about reuniting with Jack on the Titanic.

22 **III. LEGAL STANDARD UNDER RULE 12(b)(6)**

23 On a motion to dismiss brought pursuant to Rule 12(b)(6), the Court must
24 accept as true all factual allegations in the complaint, and construe those facts and
25 all reasonable inferences drawn from those fact in the light most favorable to
26 Plaintiff. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). To
27 survive a motion to dismiss, “a complaint must contain sufficient factual matter,
28 accepted as true to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*

1 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S.
2 544, 570 (2007)).

3 In ruling on a 12(b)(6) motion, a court generally cannot consider material
4 outside of the complaint (e.g., those facts presented in briefs, affidavits, or discovery
5 materials). *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). A court may,
6 however, consider exhibits submitted with the complaint. *Id.* Also, a court may
7 consider documents that (a) are not physically attached but whose contents are
8 alleged in the complaint or (b) are documents on which plaintiff's claims depend,
9 even if their contents are not explicitly alleged in the complaint. *Id.* Further, it is
10 proper for the court to consider matters subject to judicial notice pursuant to Federal
11 Rule of Evidence 201. *See Mir, M.D. v. Little Co. of Mary Hosp.*, 844 F.2d 646,
12 649 (9th Cir. 1988). Finally, courts may dismiss a complaint without leave to
13 amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*,
14 203 F.3d 1122, 1129 (9th Cir. 2000).

15 **IV. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM** 16 **FOR COPYRIGHT INFRINGEMENT**

17 To state a claim for copyright infringement, a plaintiff must allege: "(1)
18 ownership of a valid copyright, and (2) copying of constituent elements of the work
19 that are original." *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 361
20 (1991). The second prong requires the plaintiff to allege and ultimately show that
21 "the infringer had access to plaintiff's copyrighted work and the works at issue are
22 substantially similar in their protected elements." *Cavalier v. Random House*, 297
23 F.3d 815, 822 (9th Cir. 2002).

24 Here, Paramount concedes that Plaintiffs has alleged ownership of three
25 copyrights. Plaintiffs' claim for infringement of those copyrights, however, fails for
26 three independent reasons. First, Plaintiff's Biographies and the motion picture
27 *Titanic* are not substantially similar as a matter of law. Second, Plaintiffs have
28 failed to allege that protectable elements of Plaintiff's Biographies have been

1 copied, and third, Plaintiffs fail to allege facts to establish that the creator of *Titanic*
 2 had access to Plaintiff's Biographies.

3 ***A. Plaintiff's Biographies and Titanic Are Not Substantially Similar as a***
 4 ***Matter of Law***

5 It is well-settled that the issue of substantial similarity in a copyright
 6 infringement case may be determined by the court, as a matter of law, at the pleading
 7 stage by examining and comparing the relevant works. *Christianson v. West Pub.*
 8 *Co.*, 149 F.2d 202 (9th Cir. 1945); *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d
 9 1108, 1112 (N.D. Cal. 2010) (granting motion to dismiss after finding that plaintiff's
 10 work and the allegedly infringing work, both judicially noticed, were not substantially
 11 similar as a matter of law); *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124 (C.D.
 12 Cal. 2007) (granting motion to dismiss after a comparison of plaintiff's show script
 13 with allegedly infringing shows on DVD, both referenced in the complaint and
 14 judicially noticed by the court, showed a lack of substantial similarity as a matter of
 15 law); *Lake v. Columbia Broadcasting Sys., Inc.*, 140 F. Supp. 707, 708 (S.D. Cal.
 16 1956) ("[T]he Court may assume validity of the copyright and, comparing the literary
 17 products incorporated into the complaint, determine as a matter of law whether or not
 18 the copyright has been infringed."); *see also Peter F. Gaito Architecture, LLC v.*
 19 *Simone Develop. Corp.*, 602 F.3d 57, 64-65 (2d Cir. 2010) (holding that a court may
 20 determine substantial similarity as a matter of law on a motion to dismiss).

21 To perform this analysis, courts may take judicial notice of the asserted
 22 copyrighted works and the allegedly infringing works that are referred to in the
 23 complaint and whose authenticity no party questions. *See, e.g., Campbell*, 718 F.
 24 Supp. 2d at 1112 n.3; *Zella*, 529 F. Supp. 2d at 1128-29. Once the Court has taken
 25 judicial notice of the relevant works, "the works themselves supersede and control
 26 contrary descriptions of them, including any contrary allegations, conclusions, or
 27 descriptions of the works contained in the pleadings." *Peter F. Gaito Architecture*,

28

1 *LLC*, 602 F.3d at 64 (citing *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.
2 1986) and 3-12 Nimmer on Copyright § 12.10) (internal quotes omitted).

3 Paramount has provided the Court with copies of Plaintiff's Biographies and
4 with a copy of the motion picture *Titanic*, which are appropriate for judicial notice
5 and may be considered in connection with this Motion. As explained below, a
6 comparison of these works demonstrates that Plaintiffs' claim for copyright
7 infringement fails because there is no substantial similarity as a matter of law.

8 To assess substantial similarity as a matter of law, the Court must apply the
9 objective "extrinsic test," which focuses on the "articulable similarities between the
10 plot, themes, dialogue, mood, setting, pace, characters, and sequence of events."
11 *Zella*, 529 F. Supp. 2d at 1133 (quoting *Funky Films, Inc. v. Time Warner Ent't Co.*,
12 462 F.3d 1072, 1077 (9th Cir. 2006)). In performing this analysis, the court "must
13 take care to inquire only whether the protectable elements, standing alone, are
14 substantially similar' and to 'filter out and disregard the non-protectable elements in
15 making [the] substantial similarity determination.'" *Id.*

16 In this case, even assuming that Plaintiffs had identified infringement of
17 protectable elements (which they have not), a comparison of Plaintiff's Biographies
18 to *Titanic* reveals that the works are not "substantially similar." Indeed, the works
19 are not at all similar and, for that reason, Plaintiffs cannot state a claim for copyright
20 infringement. *See, e.g., Zella*, 529 F. Supp. 2d 1124 (finding, at the motion to
21 dismiss stage, that the *Rachel Ray* talk-style show was not substantially similar to
22 plaintiff's scripts of a 30-minute interview/cooking show).

23 **1. Plot, Setting, Themes, Mood, and Sequence of Events**

24 On every level, *Titanic* and Plaintiff's Biographies have fundamentally
25 different plots, themes, settings, and sequences of events. The plots and sequence of
26 events turn on entirely different storylines and events. Plaintiff's Biographies
27 recount the story of an individual, Gilbert Glenn, who is forced out of the United
28 States Air Force during the 1950s for being a whistleblower. This fateful event

1 ruins his life and that of his family. In contrast, *Titanic* is a story of young love that
 2 takes place aboard the Titanic in 1912. The shipboard romance centers on a young
 3 socialite who is engaged to a wealthy boor and a young working class man traveling
 4 in third-class. The motion picture also depicts the true story of the tragic sinking of
 5 the Titanic.

6 The scenes are also markedly different. Plaintiff's Biographies take place in a
 7 multitude of settings and locations across North America, from Tennessee to
 8 Wisconsin to Newfoundland to Ohio and back to Tennessee. *Titanic*, takes place
 9 primarily aboard the English passenger ship as it sails at sea.

10 The works also take place in different eras. Plaintiff's Biographies set forth
 11 her father's story over a thirty-year period against a backdrop of historical events of
 12 the latter-half of the twentieth century—including the Korean war, the McCarthy
 13 Era, and the presidency of Richard Nixon. *Titanic*, takes place in the span of a few
 14 days in 1912 with a short visit to the present day.

15 The moods of the two works are also in stark contrast. Plaintiff's Biographies
 16 relate a mood of tragedy and despair. And although *Titanic* is largely a romantic
 17 tragedy, its mood of young love and adventure are integral to the film and its critical
 18 acclaim.

19 Despite the lack of similarities, Princess Kennedy has attempted to
 20 characterize the plot and theme of *Titanic* as substantially similar to Plaintiff's
 21 Biographies because, among other things, both stories involve a romance that was
 22 disapproved by the mother-in-law. This is not a "plot" and, at most, Plaintiffs have
 23 alleged a generic similarity—one which is not protected by copyright law. *See*
 24 *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (holding that the basic plot
 25 idea is not protected by copyright law).

26 **2. Characters**

27 The primary characters of *Titanic* are not similar, let alone "substantially
 28 similar," to the primary characters in Plaintiff's Biographies. The primary

1 characters of *Titanic* are Jack and Rose. Jack is a free-roaming drifter of limited
 2 means and Rose is a young socialite from a wealthy background who yearns to
 3 escape the confines of her social status. The primary characters of Plaintiff's
 4 Biographies are her parents, Gilbert and Lorine. Gilbert is an accomplished and
 5 ethical officer of the U.S. Air Force. Lorine is his devoted wife and mother of his
 6 children. Thus, the names and character types are different. Further, characters
 7 similar to Gilbert and Lorine do not appear in any form—in *Titanic*. Accordingly,
 8 the works are not “substantially similar” in term of characters.

9 **3. Dialogue**

10 To support a claim of substantial similarity based on dialogue, the plaintiff
 11 must demonstrate—and therefore, at the minimum, allege—“extended similarity of
 12 dialogue.” *See Olson v. National Broadcasting Co.*, 855 F.2d 1446, 1450 (9th Cir.
 13 1988). Ordinary words and phrases are not entitled to copyright protection, nor are
 14 “phrases or expressions conveying an idea typically expressed in a limited number
 15 of stereotyped fashions.” *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989).
 16 Plaintiffs have not alleged that any dialogue (that is, non-ordinary words and
 17 phrases) from *Titanic* is substantially similar to the dialogue in any of Plaintiff's
 18 Biographies. Nor can Plaintiffs amend to cure this defect because a comparison of
 19 Plaintiff's Biographies and *Titanic* reveals that the dialogue is remarkably different.

20 In sum, an analysis of the relevant factors of the “extrinsic” test reveal that
 21 Plaintiff's Biographies and *Titanic* are not substantially similar in any way and,
 22 accordingly, Plaintiffs fail to state a claim for copyright infringement.

23 **B. The First Amended Complaint Fails to Allege Copying of Protected** 24 **Elements**

25 The First Amended Complaint also fails on the independent ground that it
 26 does not allege infringement of protectable elements of Plaintiff's Biographies. For
 27 purposes of a copyright infringement claim, only “protected *expression*” is relevant
 28 for purposes of analyzing substantial similarity. *Idema v. Dreamworks, Inc.*, 162 F.

1 Supp. 2d 1129, 1176 (C.D. Cal. 2001) (emphasis in original). “[U]nprotectable
 2 elements” include in relevant part “‘ideas’ as distinguished from ‘expression’ of
 3 those ideas” and “elements borrowed from another author or from the ‘public
 4 domain.’” *Id.* at 1176-77. *See also Funky Films, Inc. v. Time Warner Entm’t Co.,*
 5 *L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (holding that ideas and “scenes à faire”
 6 elements that flow naturally from generic plot lines, are not protectable).

7 In the First Amended Complaint, Princess Kennedy alleges that *Titanic* is
 8 similar to her “unpublished biographies” because of the commonalities including
 9 “[characters] Jack, Rose, Lucy, Marvin, MaryJane . . . the card game and winning
 10 ticket, the artist drawing the girl, girl on the pier, the inspection, playing the card
 11 game with men with different accents . . . the woman in white gown, floating,
 12 money put into the pocket, the Diamond” because they “all appear in the movie.”
 13 (FAC, ¶ 5.) Additionally, Princess Kennedy alleges that the passionate night
 14 between Jack and Rose that took place in a car in the cargo hold of the *Titanic* is
 15 substantially similar to “the cab scene where I am in the car . . . we are in the cab,
 16 [the Preacher] is heavy and he wants his hands on a 1-year old baby me.” (FAC, ¶
 17 11.) None of these are protectable elements as explained in the authorities cited
 18 above.

19 Exhibit C to the First Amended Complaint—which purports to demonstrate
 20 similarities between Plaintiff’s Biographies and *Titanic*—also reveals that Princess
 21 Kennedy has, at most, alleged infringement of unprotectable elements. Princess
 22 Kennedy’s allegations in Exhibit C include the following:

- 23 • Plaintiff’s Biographies recount a story of “youngsters . . . [who] find
 24 their fortune,” which is allegedly similar to the search for a treasure—
 25 the “Heart of the Ocean”—in *Titanic* (FAC Exh. C [24-4] at 1.)
- 26 • Scenes in *Titanic* in which Jack puts on a coat and “slicks his hair back
 27 with spit” are allegedly similar to an instance where Gilbert “combed
 28 through his hair with both hands.” (FAC Exh. C [24-5] at 18.)

- 1 • The scene in the *Titanic* where Jack tells Rose that “she’s no picnic”
2 while a “little blonde girl [is] having tea” and “Jack is at the railing” is
3 allegedly similar to a scene in Plaintiff’s Biographies where people
4 “come back from their picnic and [Princess Kennedy] was in the baby
5 bed crying and screaming as the teapot for tea was whistling as I tried
6 to escape climbing over the rail.” (FAC Exh. C [24-5] at 19.)
- 7 • In one scene of the *Titanic*, Princess Kennedy alleges that “[w]e see
8 rows of stacked cargo,” which is allegedly similar to a scene in
9 Plaintiff’s Biographies where “[w]e see rows of stacked crates, with
10 rotting wastes in containers.” (FAC Exh. C [24-5] at 25.)
- 11 • The scene in *Titanic* in which Jack is handcuffed for stealing the Heart
12 of the Ocean is allegedly similar to the scene in which Gilbert is
13 arrested for the alleged neglect of his five minor children. (FAC Exh.
14 C [24-5] at 41.)
- 15 • Caledon’s suicide as a result of the 1929 stock-market crash in *Titanic*
16 is allegedly similar to a crash caused by an airplane that happens during
17 a story in Plaintiff’s Biographies. (FAC Exh. C [24-5] at 49.)
- 18 • The scene in *Titanic* where Rose “pulls necklace out” near the end of
19 the film is allegedly similar to a scene in Plaintiff’s Biographies where
20 “My nose was burning because I had a tube through my nose running
21 down to my stomach . . . I tried to pull the tube out of my nose, but, the
22 doctor stopped me.” (FAC Exh. C [24-5] at 58.)

23 These allegations are not actionable because they fail to state a claim for
24 infringement of protectable elements. As demonstrated above, Princess Kennedy’s
25 allegations *at most* state that there are common words, characters, and conceptual
26 links between Plaintiff’s Biographies and *Titanic*. The purported similarities of the
27 works—such as generic plot-lines (e.g., search for a treasure), common scenes
28 (cargo boxes), and similar words used (e.g., “crash,” albeit in two different

1 contexts)—are at best *scènes à faire* that copyright law does not protect. However,
 2 in order to state a claim for copyright infringement, Plaintiffs must allege copying of
 3 protectable expression. This Plaintiffs have failed to do.²

4 **C. The First Amended Complaint Fails to State a Claim Under**
 5 **Metcalf v. Bochco**

6 Nor do Plaintiffs’ allegations in paragraph 5 of the First Amended Complaint
 7 support a claim that Paramount has infringed Plaintiff’s Biographies under *Metcalf*
 8 *v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002). There, the court found that the
 9 copying of a “*significant* number of unprotectable elements” could be actionable.
 10 *Id.* In *Metcalf*, however, the copyrighted and infringing works shared *many* similar
 11 generic elements. For example, they both contained settings in overburdened
 12 county hospitals in inner-city Los Angeles with black staffs, themes of poverty, race
 13 relations, and urban blight; and characters who had similar physical descriptions and
 14 events in their lives. 294 F.3d at 1074-75. To state a claim under this theory,
 15 Plaintiffs must allege a series of “striking” similarities between the works such that
 16 a jury “could easily infer that the many similarities between plaintiffs’ scripts and
 17 defendants’ work were the result of copying, not mere coincidence.” *Id.* at 1075.
 18 Later courts have required that the similarities be seen in a “string” and voluminous.
 19 *Zella*, 529 F.Supp.2d at 1138.

22 ² Exhibit C of the First Amended Complaint appears to include additional
 23 explanations of purported similarities, which are then apparently followed by pages
 24 of scripts with handwritten notes. In many cases, the supporting scripts refer to
 25 *Forrest Gump*, the subject of a lawsuit which Princess Kennedy lost on summary
 26 judgment. *See, e.g.*, FAC Exh. C [24-4] at 29 & 53 (writing that her text is similar
 27 to “Forrest [running] with 20 followers behind”). In other instances, Princess
 28 Kennedy’s notes on scripts further reinforce that her allegations involve, at best,
 unprotectable *scènes à faire*. *See, e.g.*, FAC Exh. C [24-4] at 77 (commenting that
 the Works’ scene of Therese painting a picture of a girl with a father is similar to the
 scene of Jack drawing a nude Rose); FAC Exh. C [24-4] at 17 (commenting that text
 relating to arms transfer to China was similar to “SHIP . . . with people on it”).

1 Plaintiffs fail to state a claim under this theory of infringement. As described
 2 above, it is difficult to find *any* similarity between Plaintiff's Biographies and
 3 *Titanic*. And to the extent there are any, Plaintiffs have at most identified random,
 4 scattered similar ideas that do not amount to the same "string" of similarities present
 5 in *Metcalf*. See, e.g., *Flynn v. Surnow*, 70 U.S.P.Q.2d 1231, 1238 (C.D.Cal. 2003)
 6 (rejecting a *Metcalf* theory because the alleged similarities are "randomly scattered
 7 throughout the works and have no concrete pattern or sequence in common.").
 8 Accordingly, Plaintiffs cannot claim that the generic elements of Plaintiff's
 9 Biographies have been infringed by Paramount in connection with *Titanic*.

10 ***D. The First Amended Complaint Fails to Sufficiently Allege Access***

11 Plaintiffs have also failed to allege the essential element of access—that
 12 somehow the creator of *Titanic* had access to Plaintiff's Biographies. Ultimately,
 13 Plaintiff will be required to prove—and therefore, at this time, is required to plead
 14 facts supporting such a claim—that there is some nexus between the individual who
 15 had access to Plaintiff's work and the creator of the allegedly infringing work. See
 16 *id.* The "bare possibility" that the creator of *Titanic* may have had access to
 17 Plaintiff's work is insufficient to sustain Plaintiff's copyright claim. See *Jason v.*
 18 *Fonda*, 698 F.2d 966, 967 (9th Cir. 1982).

19 Here, Plaintiffs allege in the First Amended Complaint that Paramount
 20 "acquired her copyrighted material in the discovery process when Defendant told
 21 her to turn over her copyrighted work, in a previous lawsuit, then they copied and
 22 bounded Plaintiff's copyrighted work." (FAC, ¶ 13.) In other words, Princess
 23 Kennedy alleges that her production of Plaintiff's Biographies to counsel
 24 representing defendants Paramount, Viacom, and Blockbuster in the litigation
 25 involving *Forrest Gump* somehow made its way to the writer and director of
 26 *Titanic*, James Cameron. See RJN Exh. 8. This "bare possibility" (or sheer
 27 speculation) of access is insufficient to state a claim for copyright infringement. See
 28 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (to survive a motion to

dismiss, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level").

E. Adam Urich Fails to State a Claim for Copyright Infringement Because He Lacks Standing

In order to state a claim for copyright infringement, Plaintiff must be the owner of the copyright or the legal or beneficial owner of an exclusive right of a copyright. 17 U.S.C. § 501. Plaintiff Adam Urich has failed to state any facts supporting a claim that he is the owner of any of the copyrights (or a legal or beneficial owner of an exclusive right thereof) at issue in the First Amended Complaint. To the contrary, Plaintiffs allege that Plaintiff's Biographies are owned by Teresa K. Urich and/or Terry Urich (Princess Kennedy). (FAC, ¶¶ 6-7 & Exh. A.) They further allege that Princess Kennedy is the "sole proprietor of the Subject Work[s] included in this action." (FAC, ¶ 14.) Plaintiff Urich is identified only as the "heir" of Princess Kennedy. (FAC, ¶ 10.) Accordingly, Plaintiff Adam Urich lacks standing to state a claim for copyright infringement.

V. AMENDMENT WOULD BE FUTILE

Princess Kennedy brought suit against Paramount twelve years ago alleging that the film *Forrest Gump* infringed Plaintiff's Biographies. This Court granted summary judgment against Princess Kennedy, and as the record reflects, educated Princess Kennedy that generic, unprotectable elements are not actionable and admonished Princess Kennedy about further copyright lawsuits.

Notwithstanding that admonition, Princess Kennedy has initiated *another* action based on the *same* copyrights and the *same* theories that Paramount has infringed generic scenes, ideas, and loosely connected concepts. Princess Kennedy has amended her claims once in this action, but the First Amended Complaint stills fails to state a viable cause of action because *Titanic* is not "substantially similar" to Plaintiff's Biographies as a matter of law, Plaintiffs have not alleged infringement of protectable elements, and Plaintiffs have failed to allege that the creator of *Titanic*

1 had access to Plaintiff's Biographies. Accordingly, the First Amended Complaint
2 should be dismissed.

3 Where, as here, Plaintiff has not—and cannot—allege facts to substantiate a
4 claim, amendment would be futile and the Court should dismiss Plaintiff's
5 Complaint with prejudice. *See Moore v. United States*, 193 F.R.D. 647, 651 (N.D.
6 Cal. 2000) (“a court may dismiss a pro se litigant's complaint without leave to
7 amend if it appears beyond a doubt that the plaintiff can prove no set of facts that
8 would entitle him to relief and this defect cannot be cured by amendment”).

9 **VI. CONCLUSION**

10 For the foregoing reasons, Paramount respectfully requests that the First
11 Amended Complaint be dismissed with prejudice.

12 DATED: November 13, 2012 Respectfully submitted,

13 CALDWELL LESLIE & PROCTOR, PC
14 JOAN MACK

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16
17 By _____/s/
18 JOAN MACK
19 Attorneys for PARAMOUNT PICTURES
20 CORPORATION
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 725 South Figueroa Street, 31st Floor, Los Angeles, California 90017-5524.

On November 13, 2012, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PARAMOUNT PICTURES CORPORATION'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** on the interested parties in this action as follows:

Princess Samantha Kennedy
Adam Clayton Urich
777 Seacoast Drive, No. N
Imperial Beach, CA 91932

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 13, 2012, at Los Angeles, California.

/s/
Mirela Popescu